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Supreme Court of the United States

TERM — 1981

ROBERT A. JACOBS AND MIDLAND INSURANCE COMPANY,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BY COUNSEL OF RECORD:

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A. QUESTIONS PRESENTED

I. Whether a proceeding on the Government's motion for forfeiture of a bail bond against a bondsman and surety is a civil or criminal proceeding.

II. Whether, in a forfeiture proceeding the bondsman and surety may be denied all discovery rights otherwise available to other parties under Rule 26 (b) (1) of the Federal Rules of Civil Procedure.

III. Whether, in a bond forfeiture proceeding, the bondsman and surety may be denied all discovery simply because the district court concluded from its *in camera* examination of certain materials submitted by the Government that those materials were hearsay in nature.

IV. Whether, in a bond forfeiture proceeding, the "informer's privilege" may act as a complete bar to all discovery by a bondsman and surety of information relevant to their defense of the action, where prior to the scheduled appearance of the criminal defendant (the principal on the bond): 1) the Government learned of a plan to kill the principal and offered him federal protection, and 2) the principal, in fact, disappeared under circumstances indicating that he had been killed by underworld figures; and subsequent to the required court appearance, the Government conducted an extensive grand jury investigation which developed information from many sources, not all of whom were informants, that the informant had been killed.

V. Whether, in a bond forfeiture proceeding, the informer's privilege" is invoked by the bare refusal of the Government to disclose information in its files where it never expressly claimed the "informer's privilege" or represented that revelation of an informant's identity would place that person in jeopardy, would result in that person's being unavailable in the future as a Government informant, or would interfere with any on-going investigation.

VI. Whether the "informer's privilege" is entitled to greater weight in a civil proceeding than in a criminal proceeding.

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C. REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS

The opinion of the United States Court of Appeals for the Second Circuit is not reported but appears in the Appendix hereto. (App. 1) The memorandum of opinion (styled as an order) by the United States District Court for the District of Connecticut and the endorsement of that court on the Government's Motion for Forfeiture of Bond have not been reported but appear in the Appendix hereto. (App. 4, 9)

D. STATEMENT OF THE GROUNDS FOR JURISDICTION

1. The date of the judgment sought to be reviewed is November 10, 1980.

2. A petition for rehearing or, alternatively, rehearing *en banc,* was denied on February 5, 1981.

3. No cross-petition for writ of certiorari has yet been filed by the United States, the respondent herein.

4. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

E. STATUTORY PROVISIONS

Rule 26(b) (1) of the Federal Rules of Civil Procedure provides:

> (b) SCOPE OF DISCOVERY. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> (1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge

of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Rule 46(e) of the Federal Rules of Criminal Procedure provides:

(e) FORFEITURE.

(1) DECLARATION. If there is a breach of condition of a bond, the district court shall declare a forfeiture of the bail.

(2) SETTING ASIDE. The court may direct that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture.

(3) ENFORCEMENT. When a forfeiture has not been set aside, the court shall on motion enter a judgment of default and execution may issue thereon. By entering into a bond the obligors submit to the jurisdiction of the district court and irrevocably appoint the clerk of the court as their agent upon whom any papers affecting their liability may be served. Their liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the obligors to their last known addresses.

(4) REMISSION. After entry of such judgment, the court may remit it in whole or in part under the conditions applying to the setting aside of forfeiture in paragraph 2 of this subdivision.

F. THE BASIS OF FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The motion of the United States for Forfeiture of Bond was filed in the United States District Court for the District of Connecticut pursuant to Rule 46 of the Federal Rules of Criminal Procedure.

G. STATEMENT OF THE CASE

This is a Petition for Certiorari by the bondsman and corporate surety from a decision of the United States Court of Appeals for the Second Circuit which affirmed the judgment of the United States District Court for the District of Connecticut granting the motion of the United States for forfeiture of bond in *United States of America* v. *Salvatore Anthony Annunziato*. The affirmance by the appellate court was "substantially for the reasons" stated by the district court in its opinion dated April 14, 1980 (App. 3) and in its endorsement on an order dated June 16, 1980.[1] (App. 3) The principal on the bond, Salvatore Anthony Annunziato, did not appear in court for a calendar call on July 9, 1979. The petitioners opposed the motion on the grounds of impossibility of performance: It was impossible for Annunziato to appear in court because he was killed by underworld figures prior to the date of the scheduled court appearance.[2] The bondsman and surety were prevented from fully presenting this defense because the district court, on April 14, 1980 and May 30, 1980, denied *in toto* all their motions for discovery.

The bail forfeiture proceedings stemmed from a criminal indictment that was handed down against Salvatore Anthony Annunziato in the United States District Court for the District of Connecticut on April 26, 1979. Annunziato was charged with two counts of aiding and abetting theft of union funds in violation of Title 29, United States Code, § 501(c) and one count of conspiracy to steal union funds in violation of Title 18, United States Code, § 371. The maximum penalty on each count was five years imprisonment and/or a fine of $10,000.00.

Subsequent to indictment, Annunziato was released on a corporate surety bond in the amount of $30,000.00 on April

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[1] Although the Second Circuit refers to the district court's endorsement on an order dated June 16, 1980, it seems clear that it was referring to the district court's June 16 endorsement on the Government's Motion for Forfeiture of Bond.

[2] Impossibility of performance has long been recognized by this Court as a defense to bail forfeiture. *Taylor* v. *Taintor*, 83 U.S. (16 Wall) 366 (1873).

27, 1979. That bond was posted by Robert A. Jacobs and the Midland Insurance Company, the petitioners herein.

The evidence presented in the district court revealed that an FBI informant who had given information in the past told the FBI that there was a "contract" out on Annunziato's life and that he was about to be killed. That information was conveyed to Government attorney Donald Abrams, the Organized Crime & Racketeering Section prosecutor who was handling Annunziato's criminal case. In early June, Abrams telephoned counsel for Annunziato, informed him of the existence of the "contract", stated that the Government believed this to be a viable threat on Annunziato's life, and asked counsel to convey that information to Annunziato and to offer the protective services of the federal government. (Tr. May 30, 1980 [hereinafter referred to as Tr. III], pp. 39-42) Counsel shortly thereafter met with Annunziato and informed him of the "contract" and the Government's offer of protection. Annunziato declined that offer. (Tr. III, p. 41) On June 19, 1979, under highly suspicious circumstances which indicated that the contract had been executed, Annunziato disappeared from home. He was never heard from again. (Tr. III, pp. 6-7) His family later filed a missing persons report with the local police who, in turn, contacted the Federal Bureau of Investigation.

The FBI began an extensive investigation into Annunziato's disappearance, eventually interviewing a total of some eighty persons in states as far away as Florida, California, North Carolina and Missouri. These interviews were a part of an extensive and far-reaching grand jury investigation into the Annunziato disappearance.

Annunziato had an extensive criminal record, but had never previously failed to appear at court when required. He was well known to both federal and local law enforcement authorities in the state of Connecticut. His convictions stretched back to the early 1940's with arrests and convictions for crimes ranging from illegal purchase of gasoline tax stamps to armed robbery and aggravated assault and conspiracy. (Tr. III) At all times in the past, even when he had been convicted and

faced substantial prison sentences, he had appeared at court when required.

On July 2, 1979, after the mysterious disappearance, the Government filed a Motion for Calendar Call in which it represented that counsel for Annunziato had informed the Government that Annunziato had been missing since June 19, 1979; that a formal "missing persons report" had been filed with authorities on June 27, 1979; that since that date law enforcement personnel had attempted without success to locate Annunziato's whereabouts; and, that, in the Government's opinion, Annunziato was "unable or unwilling to keep his court commitments". (App. 11-12)

A calendar call was held on July 9, 1979. Annunziato did not appear. The Government presented the testimony of two witnesses — the bondsman, Robert Jacobs, and FBI Special Agent David Cotton. Jacobs testified that he last saw Annunziato on or about June 19, at which time he made arrangements to meet with Annunziato the following Saturday, June 23. He telephoned to confirm that meeting but no one knew where Annunziato was. Jacobs also had made substantial efforts to locate Annunziato in order to assure his appearance in the district court in response to the calendar call. Jacobs could not locate Annunziato, but said it was the general consensus that if Annunziato could be in court he would be. Jacobs had posted bond for Annunziato on numerous prior occasions, and Annunziato had always appeared in court when required. Jacobs learned through law enforcement personnel that harm was going to come to Annunziato and local law enforcement people had informed Jacobs that it was their opinion that harm had befallen him. It was Jacobs' opinion that Annunziato could not exist outside of New Haven. (Tr. July 9, 1979 [hereinafter referred to as Tr. I], p. 7)

Special Agent Cotton testified that the FBI had received information that a "contract" had been out on Annunziato's life prior to his disappearance. He further testified that that information was conveyed to Annunziato by his attorney and that many of his friends and acquaintances believed that he had been the victim of foul play. (Tr. I, pp. 8-11) Cotton had

been informed by the East Haven Police Department on June 27, 1979 that a missing persons report had been filed by Annunziato's family on that date. The report indicated that he had disappeared from his home on June 19, 1979. Based on interviews conducted by FBI agents of Annunziato's family, it was learned that Annunziato had received a telephone call at approximately 8:00 p.m. on the evening of June 19 and shortly thereafter left his home in response to a car horn. He had not been seen nor heard from since that date. The FBI interviewed friends and family members and also asked for assistance in the investigation from other FBI field offices. (Tr. I, p. 9)

At the conclusion of the hearing, the court issued a bench warrant in compliance with the Government's request and set bond in the amount of $250,000.00. The Government did not request forfeiture of bail. (Tr. I, pp. 12-13)

Some nine months later, on March 13, 1980, the Government filed a Motion for Forfeiture of Bond. In its motion, the Government stated that the United States Marshal Service had not executed the bench warrant issued in July of the preceding year; that a grand jury investigation was instituted into the disappearance of Annunziato; and that the investigation had concluded. (App. 13-15) In its memorandum in support of the motion, the Government indicated that the grand jury investigation into the disappearance of Mr. Annunziato was conducted between June, 1979 and January, 1980, and that approximately 80 persons had been interviewed by the FBI in connection with that investigation.[3] (App. 33) The Government inexplicably omitted any mention of the information it had received about the planned execution of Annunziato.

The bondsman and corporate surety filed a number of pleadings to assist them in marshalling evidence to show that Annunziato had been executed prior to the date of his required court appearance: Requests for Admissions (App. 16); Interrogatories (App. 19); Request for Production (App. 28); and a Request for an Extension of Time Within Which to File a

[3] The grand jury did not return an indictment against Annunziato for bail jumping. 18 U.S.C. § 3150.

Responsive Memorandum and for An Evidentiary Hearing on the Motion for Forfeiture. The Government objected to all of these pleadings, claiming that the discovery provisions of the Federal Rules of Civil Procedure were inapplicable to the bond forfeiture proceedings.

Oral argument was held and counsel for the bondsman and surety represented that all of the information then available to the bondsman and surety indicated that Annunziato had been killed prior to the date of the calendar call. Counsel represented that it was necessary to obtain discovery of certain facts known only to the Government by virtue of its investigation so that the bondsman and surety could gather evidence essential to presenting the defense of impossibility of performance. (Tr. April 1, 1980 [hereinafter referred to as Tr. II], pp. 22-23) The bondsman and surety contended that the information in the Government's files would either support the contention that Annunziato had been killed or serve as a foundation for further investigation which would establish the truth of that contention.

The Government vehemently opposed petitioners' discovery motions but agreed to submit "the grand jury materials *or* the FBI investigation" for in camera review by the district court. (Emphasis added) (Tr. II, p. 34) It should be noted that the Government did not represent that either or both of these items represented *all* of the information in its possession with respect to whether Annunziato was alive or dead. (Exactly what materials were submitted by the Government to the district court cannot be known; a close reading of the district court's memorandum[4] leads to the conclusion that only the F.B.I. files, and not the grand jury transcripts or other information contained in the United States Attorney's files were submitted to or examined by the district court. Those materials submitted

[4] "[t]he information contained in the F.B.I. files relative to the whereabouts of Mr. Annunziato, specifically the speculation that he is deceased, was obtained by the F.B.I. from informant sources developed during the course of a criminal investigation. The sources of such information bring to bear what is known as the informer's privilege. . ." (App. 6)

were marked as Court Exhibit 1 and submitted under seal to the United States Court of Appeals for the Second Circuit. The Clerk of the Second Circuit has been requested to certify and forward, under seal, this part of the record to this Court.)

In a memorandum opinion dated April 14, 1980, the district court denied *in toto* petitioners' Request for Admissions, Interrogatories, and Request for Production (App. 4-8), concluding that the information requested by the petitioners would necessarily lead to a revelation of the identity of informant sources. The district court noted:

> This Court has reviewed all of the documents delivered to it by the Federal Bureau of Investigation (F.B.I.) and finds no information contained therein which *establishes* that Mr. Annunziato was dead on or before July 9, 1979. The information relative to claims that Mr. Annunziato is dead can at best be characterized as speculative uncorrobated multiple hearsay which is also contradictory in nature. (App. 5-6) (Emphasis added)

The district court then balanced the parties' competing interests in the bondsman's and surety's discovery requests:

> Mr. Jacobs' potential liability in this proceeding is the loss of thirty thousand dollars ($30,000.00). Balancing Mr. Jacobs' potential loss against compelling the Government to disclose equivocal information which is likely to lead to the identity of the source leads this Court to conclude that the privilege exception to Rule 26(b) (1) Fed. R. Civ. P. is applicable to this case and the limitations on invoking that privilege as stated in Roviaro inapplicable.

Petitioners filed a Motion for Reconsideration of the Denial of Request for Identity of the Informant with supporting memorandum, which motion was denied. (App. 34)

A hearing on the Government's Motion for Forfeiture of Bond was held on May 30, 1980. The bondsman and surety called five witnesses. Mrs. Annunziato, the principal's wife, testified that she and her husband had been married since 1942 and that, with the exception of those times when Annunziato

was incarcerated, he never had been away from home for any substantial period of time. On those occasions when he had been away, he always had maintained contact with his family. She described how her husband left home on June 19, 1979 stating that after arriving at his home in East Haven, he received a telephone call and told her he would have to go out for a while. Shortly thereafter she heard a car horn outside the home and Annunziato left. After a number of days when neither she nor any other members of the family had heard from Annunziato, they became concerned about his well-being. They discussed this concern with his attorney and thereafter called the East Haven Police and filed a missing persons report on June 27, 1979. Although Annunziato had provided for his family's financial well-being while he was away on previous occasions, this did not occur on this occasion.[5] In the eleven months following June 19, 1980, Mrs. Annunziato had neither seen nor heard from her husband. (Tr. III, p. 7)

Donald Abrams had been an attorney with the Organized Crime and Racketeering Section of the United States Department of Justice prosecuting Annunziato's case at the time of his suspicious disappearance. Abrams testified that the FBI had informed him that one of its sources stated that there was a "contract" out on Annunziato's life prior to Annunziato's disappearance. Abrams was sufficiently concerned about the viability of that threat that he conveyed its existence to one of Annunziato's lawyers and offered federal protection to Annunziato. (Tr. III, pp. 14-15)

Wayne Sadick, Deputy Clerk of the Superior Court for the Judicial District of New Haven, produced documents concerning Mr. Annunziato's prior exemplary record for appearance in state court, the latest of which involved a 1971 case.

In fact, the Government stipulated that "Mr. Annunziato has numerous arrests, has a terrible record and has never failed to appear before the instance under dispute." (Tr. III, p. 28)

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[5] There is one sole exception. Approximately a week after Mr. Annunziato was missing, a friend came by and left $250.00 in cash at the home. (Tr. III, p. 11)

William Dow, one of Annunziato's attorneys, testified that Abrams contacted him in early June of 1979, advised him of a legitimate threat on Annunziato's life, and offered Annunziato federal protection. Dow advised Annunziato of this threat but Annunziato declined protection. (Tr. III, pp. 41-42)

Nicholas Pastore, the Director of Operations of the New Haven Police Department, testified that it was his opinion that "Mr. Annunziato met his demise at the hands of the underworld" on or before June 27, 1979, almost two weeks before the July 9 calendar call. Pastore had been acquainted with Annunziato for approximately fifteen years and was intimately connected with the lengthy investigation into his disappearance. Based on that investigation, Pastore testified that after Annunziato received a telephone call in the evening of June 19, 1979, he went to Bridgeport with some "former friends" and had some contact with an individual by the name of Thomas Vastano, also known as "Tommy the Blonde". In fact, Vastano had met a violent end some time subsequent to Annunziato's disappearance.

Director Pastore also testified that Caesar Canestri was an individual who had given Pastore reliable information on many occasions in the past. The petitioners introduced a transcript of a tape recorded conversation between Pastore and Canestri which took place on September 23, 1979. (Tr. III, p. 32) The transcript included statements by Mr. Canestri to Pastore in which Canestri stated that Annunziato was dead. (Defendant's Exhibit 503)

The Government called three witnesses. Special FBI Agent Edward Adams testified that on two occasions, prior to the September 3, 1979 conversation between Caesar Canestri and Nicholas Pastore introduced by the surety, he interviewed Canestri. During these conversations, Canestri opined to Adams that although he had no knowledge of the whereabouts of Annunziato, Annunziato might have gone to a warm climate with a girlfriend, and that he had heard a rumor that Annunziato might be in Italy. (Tr. III, p. 44)

Also testifying at the hearing were employees of the Bran-

ford Motor Inn, a motel in the New Haven area which Mr. Annunziato frequented. The general manager of the motel testified that on June 18, 1979 Annunziato engaged a room for two nights which he paid for in advance with cash. Since Annunziato had paid cash in advance there was no check-out information available. (Tr. III, pp. 47-53) A security officer, Stanton, who was familiar with Annunziato, testified that on June 18 he saw Annunziato check into the motel at about 6 o'clock in the evening. On the following night, June 19—the night of Annunziato's disappearance—Stanton testified that he saw neither Annunziato nor his car in the area of the motel. (Tr. III, pp. 56-60) At the conclusion of the hearing, petitioners renewed their motion seeking the identity of the informer, but the court again denied the motion. (Tr. III, p. 74)

On June 16, 1980, the court placed an endorsement on the Government's Motion for Forfeiture of Bond as follows:

> Viewing the evidence with a circumspective eye, this Court finds the testimony presented by the bondsman as circumstantial evidence of the defendant's death, prior to July 9, 1979, seriously lacks the confidence, or sufficiency required to excuse a criminal defendant's failure to appear. The government's motion for forfeiture of bond pursuant to Rule 46(e) Fed. R. Crim. P. is GRANTED, substantially for the reasons set forth in its brief filed June 11, 1980. (App. 9)

The bondsman and surety appealed to the Second Circuit, which in a decision rendered on November 10, 1980, upheld the district court's denial of petitioners' discovery requests and affirmed the judgment of the district court granting the Government's motion to forfeit the bond of $30,000.00 "substantially for the reasons set forth in Judge Daly's opinion dated April 14, 1980 and his endorsement on the June 16, 1980 order [*sic*]."[6] (App. 3)

The petition by the bondsman and surety for rehearing and/or rehearing *en banc* was denied by the United States

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[6] See footnote 1, supra.

Court of Appeals for the Second Circuit on February 5, 1980. (App. 10)

I. REASONS FOR GRANTING THE WRIT

1. *The Decision Below Conflicts With the Decisions of Other Courts of Appeals as to Whether a Motion to Forfeit Bail Bond Is a Civil or Criminal Procedure.*

The Second Circuit treated the bond forfeiture proceeding in this case as a civil matter to which the Federal Rules of Civil Procedure apply. In its decision, the Second Circuit quoted from the memorandum of the district court dated April 14, 1980 in which the district court stated that it was led "to conclude that the privilege exception to Rule 26(b) (1) of the Fed. R. Civ. P. is applicable to this case" and went on to affirm the judgment of the district court. Thus, the Second Circuit concluded that a hearing on forfeiture of a bail bond is a civil proceeding.

The Tenth Circuit has taken the opposite position. In *United States* v. *Jones,* 567 F.2d 965 (10th Cir. 1977), that court held that an appeal by a surety from a judgment on forfeiture of bail bond is controlled by the Federal Rules of Criminal Procedure. In its decision in *Jones,* the Tenth Circuit noted that its position was in conflict with at least two other circuits. *Id.* at 967.

The Second Circuit followed the lead of the Fifth, Ninth and Third Circuits in treating bail bond forfeiture proceedings as governed by the Federal Rules of Civil Procedure. *United States* v. *Zarafonitis,* 150 F. 97 (5th Cir. 1907); *United States* v. *Barger,* 458 F.2d 396 (9th Cir. 1972); *United States* v. *Plechner,* 577 F.2d 596 (9th Cir. 1978); *United States* v. *Martinez,* 613 F.2d 473, 482 n. 30 (3d Cir. 1980). The Sixth Circuit has also implicitly adopted this position. *United States* v. *D'Anna,* 487 F.2d 899 (6th Cir. 1973). In *Plechner,* the Ninth Circuit expressly recognized that its position differed from that of the Tenth Circuit but stated, "[b]ased on precedent within our

own circuit and a reexamination of the relevant principles, we conclude that enforcement of a bond forfeiture is, like an action to collect a criminal fine, a civil case arising from a prior criminal proceeding." 577 F.2d at 597.

2. *The Court Below Has Decided Important Questions of Federal Law Which Have Not Been, But Should Be, Decided by This Court.*

A.

In the bond forfeiture proceeding below, the petitioners relied on the long-recognized defense of impossibility of performance. *Taylor* v. *Taintor,* 83 U.S. (16 Wall.) 366 (1873). By seeking discovery, they attempted to marshall evidence to support this defense by showing that Annunziato had been killed before the date of the calendar call. The district court's ruling completely denied them discovery and, thus, thwarted their efforts to prove their defense. Under the circumstances here, set forth in the Statement of Facts, this defense was far from a speculative "shot in the dark" defense.

The district court concluded that they were not entitled to the discovery sought because the "information relative to the claims that [he] is dead can best be characterized as speculative uncorroborated multiple hearsay which is also contradictory in nature." (App. 5-6) However, under Rule 26 of the Federal Rules of Civil Procedure, which the courts below found applicable to the proceedings in this case, the fact that the information sought would be inadmissible at trial is not a bar to discovery if that information appears "reasonably calculated to lead to the discovery of admissible evidence." By denying discovery because of the character of the information available, the lower courts denied to petitioners that discovery to which a party in a civil proceeding is entitled under Rule 26 of the Federal Rules of Civil Procedure.

This Court should decide the extent to which Rule 26 of the Federal Rules of Civil Procedure is applicable to bond forfeiture proceedings.

B.

Rule 26(b)(1) of the Federal Rules of Civil Procedure provides that parties may obtain discovery "regarding any matter not privileged." Precisely what, if anything, the Government must do to invoke the "informer's privilege" has not previously been decided by this Court. Also not previously decided, but raised by the instant case, is whether the trial court, *sua sponte,* may invoke the privilege on behalf of the Government where the Government, itself, has failed to squarely raise the issue.

Where the Government chooses to invoke the privilege of "military secrets", it has been required by this Court to assert a "formal claim of privilege" lodged by the head of the department that has control over the matter, after actual, personal consideration by that officer. *United States* v. *Reynolds,* 345 U.S. 1 (1953). In contrast, many courts have permitted invocation of the "informer's privilege" on the bare assertion that the informant status exists, and that the prosecution is unwilling to disclose the name. See *Melendez* v. *Superintendent, Clinton Correctional Facility,* 399 F.Supp. 430, 438 (E.D.N.Y. 1975). Given the frequency with which the "informer's privilege" is raised, and the number of cases affected, it would be most useful for this Court to set guidelines for its assertion.

The Second Circuit, by adopting the reasoning of the district court, here permitted the invocation of the "informer's privilege" with no express claim thereto by the Government.[7] The nearest approximation to such a claim was the Government's representation during the April 1, 1980 hearing that:

> The government's investigation into the disappearance of Mr. Annunziato involved both FBI interviews and a grand jury investigation, which I might represent to the Court went parallel and along with an additional criminal in-

[7] The defendants had requested in their interrogatories that the Government: Please identify by name and address all individuals who have provided to the United States of America, or to any of its agents, attorneys, representatives, or others acting on its behalf, or to any state or local law enforcement personnel, any information to the effect that, or expressed the belief that, Salvatore Anthony Annunziato is presently deceased. (App. 19)

> vestigation by the grand jury into possible federal violations by Mr. Annunziato and others. It was not a separate, entirely separate and distinct investigation in that sense, but that it was coupled with another, ongoing criminal investigation which also involved Mr. Annunziato's actions prior to his disappearance.

After an *in camera* review of an undetermined amount of the Government's file, the district court concluded on its own that "[t]he information contained in the F.B.I. files relative to the whereabouts of Mr. Annunziato, specifically the speculation that he is deceased, was obtained by the F.B.I. from informant sources developed during the course of a criminal investigation. The sources of such information bring to bear what is known as the informer's privilege . . ." (App. 6) It is especially noteworthy that the Government *never* claimed that all its information was gathered from informant sources. Nonetheless, the Second Circuit affirmed the denial of discovery substantially for the reasons set forth by the district court in its memorandum. (App. 3)

It would be useful for this Court to clarify what the Government must assert as a condition to triggering implications of the "informer's privilege". Is it enough to merely assert that the informer status exists; or, must the Government assert that disclosure of the informant's identity would jeopardize an ongoing investigation, the personal safety of the individual involved, or the utility of this individual in criminal investigations?

This clarification is essential for guidance to lower courts which must apply the test ennunciated in *Roviaro* v. *United States,* 353 U.S. 53 (1957)

> A limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action. *Id.* at 60-61

This is essentially a balancing test—"balancing the public interest in protecting the flow of information against the individual's right to prepare his defense". *Id.* at 62. If nothing more is required than the assertion of informant status or the unwillingness of the Government to disclose information contained in its files, the lower courts are left without guidance by this Court as to how the balancing test should be applied.[8] Are all alleged informants to be conclusively deemed equally valuable, and accorded the same weight on the scale balancing the need for their protection against the defendant's right to prepare his defense? This would appear to conflict with the *Roviaro* directive that the determination regarding disclosure be based on the facts presented in each case.

The absence of guidance, predictably, has resulted in a lack of uniformity in the lower courts. *Compare, Westinghouse Electric Corp.* v. *City of Burlington,* 351 F.2d 762, 768 & n.10 (D.C. Cir. 1965) (the privilege is not to protect the particular informant but to protect the flow of information to the government; the privilege is maintained to encourage possible informers in the future) *with United States* v. *Fernandez,* 506 F.2d 1200, 1204 (2d Cir. 1974) ("there is before us no convincing showing of substantial danger, and since these individuals do not provide a continuing source of information to the government, there is little occasion . . . to consider a *Roviaro* balance"); and *United States* v. *Gibbs,* 435 F.2d 621, 624 (9th Cir. 1970), *cert. denied,* 401 U.S. 994 (1971) (court must weigh the usefulness of an informer and of protecting him personally.)

The need for guidance is highlighted by the facts in the instant case. The petitioners repeatedly sought the identity of the informer in order to be able to prepare a defense. Specifically, the bondsman and surety contended that disclosure of the identity of the person who had provided information about the "contract" on Annunziato's life was crucial because they

---

[8] The problem becomes more complicated because the term "informant" has been ascribed differing meanings. *See United States* v. *Miller,* 499 F.2d 736, 741 (10th Cir. 1974); *Gordon* v. *United States,* 438 F.2d 858 (5th Cir.), *cert. denied,* 404 U.S. 828 (1971).

needed to consult with that individual both to ascertain the source of his information and to learn of further information concerning whether or not the alleged contract had been executed. (Tr. II) The government objected to any and all discovery, including that of the identity of the informant, while it simultaneously took the position that this confidential source was "unreliable."

An interrelated issue is the need for this Court to address whether a trial court may, *sua sponte,* invoke the "informer's privilege" as was done here. Other privileges, such as that against self-incrimination, must be *expressly* asserted. *See, e.g., Communist Party* v. *Subversive Activities Control Board,* 367 U.S. 1, 104 (1961). If it may, guidance is needed to direct the trial court on how to decide whether, in fact, information comes from an informant and, if so, whether the information would lead to the revelation of that individual's identity.

C.

The court below assumed that the bond forfeiture proceeding was civil in nature and adopted the position that because a defendant in a civil suit is subject to less severe sanctions in the event of an adverse judgment than a criminal defendant, a civil defendant should be required to make a greater showing of need to overcome the policies underlying maintenance of the "informer's privilege". No case law was cited for this proposition, but, rather, a commentator: 4 Moore's Federal Practice, ¶26.61 [6.-2], at 26-304 n.5 (2d ed. 1948). A few pages later, however, this same widely-cited commentator also points out that courts have taken the view that where the government is a party to an action not involving governmental regulatory functions, the presumption should be stronger that the private party should have the full benefit of the discovery procedure, and any claim of "governmental privilege" should be scrutinized with even greater skepticism. 4 Moore's Federal Practice, ¶26.61[7], at 26-323. *See also Bank Line, Ltd.* v. *United States,* 163 F.2d 133 (2d Cir. 1947).

The Government is frequently a plaintiff in a civil suit for damages; thus, the issue often arises whether the government is

entitled to a status superior to that of other private litigants with regard to matters otherwise privileged from disclosure; or whether, in fairness to the defendant, it, as other civil plaintiffs, may be required to waive the protection that the law will ordinarily afford to one who has not instituted a lawsuit. *See Henrik Mannerfrid, Inc.* v. *Teegarden,* 2 F.R. Serv. 2d 593, 596-97 (S.D.N.Y. 1959); *Brennan* v. *Automatic Toll Systems, Inc.,* 17 F.R. Serv. 2d 891, 892 (S.D.N.Y. 1973). Affording the Government a status superior to other civil plaintiffs regarding privileges, including the "informer's privilege," prohibits a "fair determination of [the] cause." *Roviaro, supra,* at 60-61.

The petitioners respectfully submit that this Court should resolve the question of whether the Government, where it is acting as a private plaintiff, is entitled to a greater protection than other private litigants with regard to discovery of otherwise privileged information. Private litigants by initiating a lawsuit, in fairness to defendants, are deemed to waive privileges,[9] to which they would otherwise be entitled, including privileges of constitutional dimension.

3. *The Court Below Has Decided a Federal Question in Confict with the Applicable Decisions of This Court.*

The district court denied all petitioners' requests for discovery for the blanket reason that the information sought was covered by the "informer's privilege."

This Court has stated that the "informer's privilege" is not absolute, and in *Roviaro* v. *United States,* 353 U.S. 53 (1957) noted:

> The scope of the privilege is limited by its underlying purpose. Thus, where the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privileged.
>
> *Id.* at 56.

[9] The theory behind waiver is that the private plaintiff has the choice of either not instituting the suit or pursuing the suit and waiving the privilege.

The Second Circuit, by its affirmance, far extended the "informer's privilege" to include *all* investigatory materials and records compiled for law enforcement purposes, even where the information sought would not lead to the revelation of the informant's identity.[10]

The reason for this extension of the "informer's privilege" appears to stem from the district court's conclusion, after reviewing, *in camera,* certain materials submitted by the Government, that there was nothing that "establishes" that Annunziato was dead on or before July 9, 1979, and that the "information relative to claims that [he] is dead can be best characterized as speculative uncorroborated multiple hearsay which is also contradictory in nature." (App. 5-6) But, where, as here, nonprivileged information is sought, the *Roviaro* privilege is inapplicable.[11]

---

[10] For example, the bondsman and surety requested in their interrogatories:

> 2(g) A full and complete summary of all. . .information [indicating that the life, health, or safety of Salvatore Anthony Annunziato was endangered]. (App. 19-20);
>
> 6(g) A full and complete summary of all. . .information [to the effect that Salvatore Anthony Annunziato was deceased]. (App. 20-21);
>
> 9(g) A full and complete summary of all. . .information [to the effect that Salvatore Anthony Annunziato is presently alive and in abscondance and unwilling to appear in court]. (App. 22);
>
> 29. Please state whether the United States of America has in its files any information to the effect that Salvatore Anthony Annunziato was connected in any way with individuals whom the United States of America considers to be members of "organized crime". (App. 26); and
>
> 34. Please state whether at any time from April 26, 1979 to the present, the United States of America received any information indicating that Mr. Annunziato had fallen into disfavor with individuals whom the United States of America believes to be members of organized crime. (App. 27)

[11] In their Petition for Rehearing and Petition for Rehearing En Banc, the bondsman and surety pointed out that the Second Circuit apparently overlooked the fact that much of the discovery sought did not involve the informant's privilege. The Petition for Rehearing was denied.

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari be granted.

The Plaintiffs

ROBERT A. JACOBS and MIDLAND INSURANCE COMPANY

Dated: March , 1981 By

Howard A. Jacobs
William F. Dow III
Karen Fox Tross
JACOBS, JACOBS & GRUDBERG, PC
350 Orange Street
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Telephone: (203) 772-3100
Their Attorneys

Office-Supreme Court, U.S.
FILED
APR 2 1981
ER L. STEVAS,
CLERK

80-1658

Supreme Court of the United States

TERM — 1981

ROBERT A. JACOBS AND MIDLAND INSURANCE COMPANY,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

APPENDIX TO PETITIONERS' PETITION
FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BY COUNSEL OF RECORD:

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Supreme Court of the United States

TERM — 1981

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v.

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 10th day of November, one thousand nine hundred and eighty.

Present:

HONORABLE WILFRED FEINBERG,
Chief Judge

HONORABLE THOMAS J. MESKILL,
Circuit Judge

HONORABLE LAWRENCE W. PIERCE,
District Judge

.....x

UNITED STATES OF AMERICA,
Appellee,

—against—

ROBERT A. JACOBS and MIDLAND INSURANCE COMPANY,
Appellants.

.....x

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is AFFIRMED.

Appellants Robert A. Jacobs, a bailbondsman, and his surety, Midland Insurance Company, appeal from an order of the United States District Court for the District of Connecticut, T. F. Gilroy Daly, J., granting the motion of appellee for forfeiture of a $30,000 bond given by appellants on behalf of Salvatore Annunziato, defendant in a criminal case in the district court (United States v. Albert Inorio, Crim. No. N-79-48). This appeal arises out of Annunziato's failure to appear in court as ordered on July 9, 1979. Appellants' defense in the bond forfeiture proceeding, and the basis of their appeal in this court, is that they were excused from their obligation to produce Annunziato because he had been killed prior to July 9 and thus performance was impossible.

On March 13, 1980, appellee moved that the bond be forfeited. On March 25, 1980, appellants filed several discovery requests designed to obtain information allegedly supplied to the government concerning possible threats on Annunziato's life. Appellee opposed these requests. The judge thereafter heard argument on the discovery requests and conducted an in camera examination of confidential evidence in the government's possession pertaining to Annunziato's disappearance. Thereafter, in a memorandum opinion (styled as an order) dated April 14, 1980, the judge denied appellants' request for discovery, stating that "balancing Mr. Jacobs' potential loss against compelling the Government to disclose equivocal information which is likely to lead to the identity of the source leads this Court to conclude that the privilege exception to Rule 26 (b)(1) Fed. R. Civ. P. is applicable to this case and the limitations on invoking that privilege as stated in *Roviaro* [v. United States, 353 U.S. 53 (1957)] inapplicable." On May 30, 1980, the judge conducted a full evidentiary hearing on bail forfeiture, at which he heard various witnesses, including Annunziato's wife; former Special Attorney Donald Abrams, who had told William Dow, Annunziato's lawyer, that the government had heard of a death threat to Annunziato from an "unreliable" confidential source; William Dow; Nicholas Pastore, Director of Operations for the New Haven Police Department; Special Agent Edward Adams; and two employees of the Branford Motor Inn, where

Annunziato had registered and was seen the day before his alleged disappearance. Thereafter, in a memorandum endorsement dated June 16, 1980, Judge Daly granted appellee's forfeiture motion, observing that the circumstantial evidence offered by appellants lacked "the competence, or sufficiency required to excuse a criminal defendant's failure to appear."

We have examined both the sealed information submitted by the government to the district judge and the entire record, including the transcript of the May 30 hearing. We conclude that Judge Daly did not abuse his discretion by refusing appellants' discovery requests, or by granting the government's forfeiture motion. United States v. Gray, 568 F. 2d 1134 (5th Cir. 1978). We affirm the judgment of the district court, substantially for the reasons stated in Judge Daly's opinion dated April 14, 1980 and his endorsement on the June 16, 1980 order.

The point was made at oral argument that no one can be absolutely sure of Annunziato's current whereabouts, or whether he is in fact alive. We wish to make clear if any new evidence is uncovered which indicates that Annunziato was deceased on July 9, 1979, appellants are free to move to reopen the forfeiture proceeding without prejudice from this order.

WILFRED FEINBERG,
Chief Judge

THOMAS J. MESKILL,
Circuit Judge

LAWRENCE W. PIERCE,
District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	
	:	
	:	
	:	
v.	:	Criminal
	:	No.
	:	N-79-48
SALVATORE ANTHONY ANNUNZIATO a/k/a Midge Renault	:	
	:	
	:	
	:	

RE: Motion for Forfeiture of Bond

ORDER

On March 13, 1980 the United States filed a motion for Bond Forfeiture pursuant to Rule 46(e) Fed. R. Crim. P. The bondsman, characterizing the forfeiture proceeding as a civil action, seeks discovery pursuant to Rules 26, 33 and 36 Fed. R. Civ. P. The United States objects to any such discovery. This Court ordered oral argument be held concerning all pending motions on April 1, 1980.

The paramount issue to be decided by this Court, and on which the surety carries the burden, is whether Mr. Annunziato's failure to appear before this Court on July 9, 1979 was occasioned by his own flight or an act of law or God. *Taylor* v. *Taintor*, 83 U.S. (16 Wall.) (1873);*Reese* v. *United States*, — U.S. (9 Wall.) (1870); *United States* v. *Agueci*, 379 F. 2d 277 (2d Cir.), *cert. denied*, 389 U.S. 897 (1967); *Annot.*, 63 ALR 2d 830 (1959). There is a rebuttable presumption in the government's favor that a defendant's failure to appear in court at the time

designated by the judge was a result of his own indiscretion rather than by forces beyond his control.[1]

This Court declined to grant the defendant's request for admissions and answers to interrogatories from the government as propounded March 25, 1980. Based on the following argument and claim by defense counsel, however, this Court decided to review all the documents in the government's possession relating to this case *in camera:*

> Mr. Dow "But I think your honor put your finger on it. I wouldn't quarrel with the fact that the bondsman does have an obligation to make a showing but where there is information available to assist a bondsman in attempting to make the showing that the individual was—that it was essentially impossible for the individual to appear on the date when required to do so, then I think that fair play would require that at least some of that information be disclosed to the bondsman to allow him to employ that in his investigation to determine or to show that the impossibility existed."
>
> * * *
>
> "I am in a position where I can state I believe with some accuracy that there has to be—that there is some information in the government's file to the effect that Mr. Annunziato was dead on or before July 9, 1979."
>
> The Court "You think there is such information?
>
> Mr. Dow "Yes. . . . [I] am confident that there is information in the government's file to that effect."
>
> (Tr. at April 1, 1980.)

This Court has reviewed all of the documents delivered to it by the Federal Bureau of Investigation (F.B.I.) and finds no information contained therein which establishes that Mr. Annunziato was dead on or before July 9, 1979. The information relative to claims that Mr. Annunziato is dead can at best be

---

[1] Counsel representing the bondsman, Robert A. Jacobs, claims that Mr. Annunziato was deceased as of the operative date.

characterized as speculative uncorroborated multiple hearsay which is also contradictory in nature.

For purposes of this order the Court will assume, as the defendant urges, that a proceeding concerning the forfeiture of bond is a civil matter entitling the parties to the liberal discovery permitted under the Federal Rules.[2] The question now arises as to whether the information reviewed by the Court is in any event subject to disclosure. Rule 26(b)(1) Fed. R. Civ. P. states in relevant part that: "Parties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action, . . ." [Emphasis aded.] The information contained in the F.B.I. files relative to the whereabouts of Mr. Annunziato, specifically the speculation that he is deceased, was obtained by the F.B.I. from informant sources developed during the course of a criminal investigation.

The sources of such information bring to bear what is known as the informer's privilege which, as stated in the leading case of *Roviaro* v. *United States*, 353 U.S. 53, 59 (1957), "is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law." Where it is likely that disclosure of information, though not identifying the speaker, could lead to the identity of the informant by the very nature of the information disclosed, the informer's privilege is applicable as well.

In the criminal context *Roviaro* delineated the scope of the informer's privilege.

> The scope of the privilege is limited by its underlying purpose. Thus, where the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privileged. [Citations omitted.] Likewise, once the identity of the informer has been disclosed

[2] Defendant's Memorandum filed April 1, 1980 at 3, *citing*, the 5th, 6th and 9th Circuits. *Contra* United States v. Jones, 567 F. 2d 965 (10th Cir. 1977).

> to those who would have cause to resent the communication, the privilege is no longer applicable. [Citations omitted.]
>
> A further limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. [Citations omitted.] In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action. [Citations omitted.]

353 U.S. at 60-61.

The informer's privilege and the limitations stated in *Roviaro* have been held to be equally applicable in civil actions. *Westinghouse Electric Corp.* v. *City of Burlington, Vermont,* 351 F. 2d 762, 769-770 (D.C. Cir. 1965). Having assumed for purposes of this order that a bond forfeiture proceeding is civil in nature this Court agrees with one leading commentator who suggests that since "the defendant in a civil suit . . . is subject to less severe sanctions in the event of a judgment against him than is true in a criminal action, [he] should be required to make a greater showing of need in order to overcome the policies underlying maintenance of the privilege." 4 MOORE'S FEDERAL PRACTICE ¶ 26.61[6.——2], at 26-304 n.5 (2d ed. 1948).

In this "civil proceeding" the defendant in interest is the bondsman, Robert A. Jacobs. Mr. Jacobs' potential liability in this proceeding is the loss of thirty thousand dollars ($30,000). Balancing Mr. Jacobs' potential loss against compelling the Government to disclose equivocal information which is likely to lead to the identity of the source leads this Court to conclude that the privilege exception to Rule 26(b)(1) Fed. R. Civ. P. is applicable to this case and the limitations on invoking that privilege as stated in *Roviaro* inapplicable.

The defendant, therefore, is not entitled to the discovery he seeks. Defendant's request for an extention of time is

GRANTED to April 28, 1980, the day scheduled for an evidentiary hearing in this matter. The material reviewed by the Court will be sealed and marked Court's Exhibit #1.

It is so Ordered.

Dated at Bridgeport, Connecticut this 14th day of April, 1980.

T. F. GILROY DALY
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	
	:	
v.	:	Cr. No.
	:	N79-48
SALVATORE ANTHONY ANNUNZIATO a/k/a Midge Renault	:	

ENDORSEMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT ON THE GOVERNMENT'S MOTION FOR FORFEITURE OF BOND

June 16, 1980—Viewing the evidence with a circumspective eye, this Court finds the testimony presented by the bondsman as circumstantial evidence of the defendant's death, prior to July 9, 1979, seriously lacks the competence, or sufficiency required to excuse a criminal defendant's failure to appear. The government's motion for forfeiture of bond pursuant to Rule 46(e) Fed. R. Crim. P. is GRANTED, substantially for the reasons set forth in its brief filed June 11, 1980.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 5th day of February, one thousand nine hundred and eighty one.

.....X

UNITED STATES OF AMERICA,

Appellee,

v.

ROBERT A. JACOBS and MIDLAND INSURANCE COMPANY,

Appellants.

.....X

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendants-appellants, Robert A. Jacobs and Midland Insurance Company.

Upon consideration by the panel that heard the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro
Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	Criminal
v.	:	No.
SALVATORE ANTHONY ANNUNZIATO a/k/a Midge Renault	:	N79-48

REQUEST FOR CALENDAR CALL

The United States, through its attorney, the United States Attorney for the District of Connecticut, by Special Attorney Donald L. Abrams requests that the court schedule a calendar call in this case as expeditiously as possible, and respectfully states the following in support thereto:

1. A sealed indictment charging the defendant with two counts of embezzlement and one count of conspiracy was returned at Hartford, Connecticut on April 26, 1979. A bench warrant was issued and bond was set in the amount of One hundred fifty thousand dollars ($150,000) by Magistrate F. Owen Eagan.

2. On April 27, 1979 the defendant was brought before Magistrate Arthur Latimer in New Haven, Connecticut. Bond was reduced to Thirty thousand dollars ($30,000) over the objection of the Government, and travel restrictions were imposed.

3. On May 3, 1979 the defendant appeared before the Honorable T. F. Gilroy Daly and entered a plea of not guilty. A request by the Government to increase the bond of Thirty thousand dollars ($30,000) was denied. The case was continued until June 5, 1979 for jury selection.

4. On June 5, 1979 the case was continued until after Labor Day on the motion of the defendant and co-defendant, Albert Inorio. Defendant Annunziato was not present and his attorney, Mr. Wm. Dow, represented that Mr. Annunziato was in the hospital.

5. On June 27, 1979 Mr. Dow informed Special Attorney Abrams that defendant Annunziato had been missing since June 19, 1979. Later on June 27, 1979, a formal missing person report on Mr. Annunziato was filed with the authorities.

6. Since June 27, 1979, law enforcement personnel have attempted to determine the defendant's whereabouts. These attempts have met with no success.

7. It is respectfully submitted in light of the foregoing that the defendant is unable or unwilling to keep his court commitments.

WHEREFORE, it is respectfully requested that the court schedule this case for a calendar call as expeditiously as possible.

RICHARD BLUMENTHAL
UNITED STATES ATTORNEY

BY:

DONALD L. ABRAMS
SPECIAL ATTORNEY
UNITED STATES DEPARTMENT OF JUSTICE

[Certification omitted]

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	
	:	
v.		Cr. No.
	:	N79-48
SALVATORE ANTHONY ANNUNZIATO a/k/a Midge Renault	:	

MOTION FOR FORFEITURE OF BOND

Comes now the United States, by and through its undersigned attorneys, and respectfully requests that the bond fixed for Salvatore Annunziato in the above-styled case be forfeited, and that a judgment of default and execution be issued. In support thereof, the United States submits the following:

1. Salvatore Annunziato was indicted in the above-styled case on April 26, 1979, along with Albert Inorio. A bond hearing was conducted on April 27, 1979, and bond was set at $30,000 with corporate surety. Surety was listed as Robert A. Jacobs, Midland Insurance Company, 350 Orange Street, New Haven, Connecticut, and a copy of the executed bond papers is attached hereto as Exhibit A.

2. On July 2, 1979, the United States filed a request for a calendar call in the above-styled case, setting forth the following:

a. A sealed indictment charging the defendant with two counts of embezzlement and one count of conspiracy was returned at Hartford, Connecticut on April 26, 1979. A bench warrant was issued and bond was set in the amount of One hundred fifty thousand dollars ($150,000) by Magistrate F. Owen Eagan.

b. On April 27, 1979 the defendant was brought before Magistrate Arthur Latimer in New Haven, Connecticut. Bond was

reduced to Thirty thousand dollars ($30,000) over the objection of the Government, and travel restrictions were imposed.

c. On May 3, 1979 the defendant appeared before the Honorable T. F. Gilroy Daly and entered a plea of not guilty. A request by the government to increase the bond of Thirty thousand dollars ($30,000) was denied. The case was continued until June 5, 1979 for jury selection.

d. On June 5, 1979 the case was continued until after Labor Day on the motion of the defendant and co-defendant, Albert Inorio. Defendant Annunziato was not present and his attorney, Mr. William Dow, represented that Mr. Annunziato was in the hospital.

e. On June 27, 1979 Mr. Dow informed Special Attorney Abrams that defendant Annunziato had been missing since June 19, 1979. Later on June 27, 1979, a formal missing person report on Mr. Annunziato was filed with the authorities.

f. Since June 27, 1979, law enforcement personnel have attempted to determine the defendant's whereabouts. These attempts have met with no success.

3. On July 9, 1979, a calendar call was held before this Court, during which Special Agent David Cotton, Federal Bureau of Investigation, and Bondsman Robert A. Jacobs testified that they were unable to locate Annunziato. At the conclusion of that hearing, a bench warrant was issued by the Court for Annunziato. The U.S. Marshals Service has advised that the warrant has not been executed. Annunziato was severed from the trial of co-defendant Inorio, and the latter was convicted on October 10, 1979.

4. A grand jury investigation was instituted into the disappearance of Annunziato, and has now concluded.

5. Rule 46(e), Federal Rules of Criminal Procedure, provides in pertinent part as follows:

> (1) Declaration. If there is a breach of condition of a bond, the district court shall declare a forfeiture of the bail.

• • •

(3) Enforcement. When a forfeiture has not been set aside, the court shall on motion enter a judgment of default and execution may issue thereon. By entering into a bond the obligors submit to the jurisdiction of the district court and irrevocably appoint the clerk of the court as their agent upon whom any papers affecting their liability may be served. Their liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes shall forthwith mail copies to the obligors to their last known address.

Accordingly, because Salvatore Annunziato has breached the conditions of his bond regarding appearances in the above-styled case, it is respectfully requested that bond be forfeited and that a judgment of default be issued.

Respectfully Submitted,

RICHARD BLUMENTHAL
UNITED STATES ATTORNEY

BY: WILLIAM A. KEEFER
ATTORNEY
U.S. DEPARTMENT OF JUSTICE

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	
	:	Cr. No.
v.	:	N79-48
	:	
SALVATORE ANTHONY ANNUNZIATO	:	

REQUESTS FOR ADMISSIONS

It is requested that the United States, within thirty (30) days of the service of this request, make the following admissions for the purposes of this action, to wit that:

1. Prior to June 19, 1979, the Federal Bureau of Investigation received information from a reliable informant that Salvatore Anthony Annunziato's life was endangered and that a "contract" was out on him.

2. That information was conveyed by the Federal Bureau of Investigation to Special Attorney Donald L. Abrams of the Department of Justice.

3. Mr. Abrams conveyed that information to counsel for Mr. Annunziato and indicated that the government considered its sources reliable and the information credible.

4. At that time, Special Attorney Abrams offered the assistance of federal law enforcement personnel to protect Mr. Annunziato's life.

5. Salvatore Anthony Annunziato was last seen by his wife on June 19, 1979 at approximately 8:00 p.m. when, after receiving a telephone call, he left his residence in response to the sound of a car horn.

6. No other person interviewed by local, state or federal law enforcement authorities has seen Mr. Annunziato since that date.

7. Mr. Annunziato has a lengthy criminal record dating back to at least 1942.

8. At no time has Mr. Annunziato ever failed to appear at court when required to do so, even though he has often faced the possibility of lengthy incarceration.

9. Mr. Annunziato has voluntarily surrendered himself for sentencing and incarceration on numerous occasions.

10. Members of Mr. Annunziato's family have filed missing persons complaints with local law enforcement authorities on or about June 27, 1979.

11. Local, state and federal law enforcement authorities have conducted extensive investigations into the circumstances surrounding Mr. Annunziato's disappearance.

12. Many of the individuals interviewed have expressed the opinion that Mr. Annunziato has been killed or executed.

13. Mr. Annunziato's family has received no contact from Mr. Annunziato whatsoever since June 19, 1979.

14. Mr. Annunziato has never previously left his family without any contact or any means of support.

15. A federal grand jury investigation was conducted to determine the whereabouts of Mr. Annunziato.

16. Many of the individuals who appeared before that grand jury or whose information was presented to the grand jury expressed the belief that Mr. Annunziato had been killed or executed.

17. Information in the files of the Department of Justice reveals that Mr. Annunziato has been linked on numerous occasions with members of organized crime up to the time of his disappearance.

18. Information contained in the files of the Department of Justice and/or the Federal Bureau of Investigation indicates that Mr. Annunziato had fallen into disfavor with certain members of organized crime prior to his disappearance.

19. The United States has no sound basis upon which to base a belief that Mr. Annunziato is presently alive or that he willfully failed to appear before this Court.

20. Bondsman Robert A. Jacobs has fully cooperated with federal law enforcement authorities.

21. Robert Jacobs has provided information about this matter to the Special Attorney of the Department of Justice on numerous occasions.

22. Mr. Jacobs has also made extensive efforts to find Salvatore Anthony Annunziato and return him to court.

23. Many of the people whom Mr. Jacobs has contacted have expressed the belief that Mr. Annunziato has been killed or executed and is no longer alive.

24. Given the existence of credible threats against the life of Mr. Annunziato, his past performance on bond, and his habits of providing for and maintaining contact with his family when apart from them, it appears likely that Mr. Annunziato was deceased as of July 9, 1979 and therefore unable to appear in court on that date.

Respectfully submitted,

HOWARD A. JACOBS
JACOBS, JACOBS & GRUDBERG, P.C.
350 Orange Street
New Haven, Connecticut 06503

[Certification omitted]

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	
	:	Cr. No.
vs.	:	N79-48
	:	
SALVATORE ANTHONY ANNUNZIATO	:	

INTERROGATORIES

It is respectfully requested that the United States of America through the Special Attorney of the Department of Justice, answer under oath, the following interrogatories, within thirty (30) days after the date of service:

1. Please identify by name and address all individuals who have provided to the United States, or any of its agents, attorneys, representatives or others acting in its behalf, or to state or local law enforcement personnel, from April 26, 1979 to the present, any information indicating that the life, health, or safety of Salvatore Anthony Annunziato was endangered.

2. With respect to each individual named in the preceding paragraph, please state:

a. The date, time and location of the transmission of said information;

b. The identity and affiliation of the recipient of said information;

c. Whether any sound transcription, written memorandum, report, note or any other written memorialization of the conveyance of such information was made;

d. If the answer to the preceding subparagraph is in the affirmative, please identify each transcription, memorandum, report, note or memorialization;

e. Whether any reward, fee, moneys, remuneration, or consideration of any kind (including promises of leniency or promises to make cooperation known to law enforcement or judicial authorities) was requested, offered and/or accepted in connection with said information;

f. If the answer to subparagraph (e) is in the affirmative, please state the nature of the consideration, the manner in which it was conveyed, the date of conveyance and, in the case of promises, to whom conveyed;

g. A full and complete summary of all such information;

h. Whether the individual has ever provided other information to any state, local or federal law enforcement authorities;

i. If the answer to subparagraph (h) is in the affirmative, please state the subject matter of such information, to whom that information was transmitted, any and all consideration extended in connection with said information; the date, time, and place of the conveyance of said information; and the recipient of that information;

j. The basis for that individual's information and belief.

3. If you will do so without a motion to produce, please supply copies of all items referred to in response to paragraph 2(c).

4. With respect to the individuals identified in response to paragraph 1, please state whether any have received any benefit whatsoever from the so-called Federal Witness Protection Program.

5. Please identify by name and address all individuals who have provided to the United States of America, or to any of its agents, attorneys, representatives, or others acting in its behalf, or to any state or local law enforcement personnel, any information to the effect that, or expressed the belief that, Salvatore Anthony Annunziato is presently deceased.

6. With respect to each individual named in paragraph 5, please state:

a. The date, time and location of the transmission of said information;

b. The identity and affiliation of the recipient of said information;

c. Whether any sound transcription, written memorandum, report, note or any other written memorialization of the conveyance of such information was made;

d. If the answer to the preceding subparagraph is in the affirmative, please identify each transcription, memorandum, report, note or other memorialization;

e. Whether any reward, fee, moneys, remuneration, or consideration of any kind (including promises of leniency or promises to make cooperation known to law enforcement or judicial authorities) was requested, offered and/or accepted in connection with said information;

f. If the answer to subparagraph (e) is in the affirmative, please state the nature of the consideration, the manner in which it was conveyed, the date of conveyance and, in the case of promises, to whom conveyed;

g. A full and complete summary of all such information;

h. Whether the individual has ever provided other information to any state, local or federal law enforcement authorities;

i. If the answer to subparagraph (h) is in the affirmative, please state the subject matter of such information, to whom that information was transmitted, any and all consideration extended in connection with said information; the date, time, and place of the conveyance of such information;

j. The basis for that individual's information or belief.

7. If you will do so without a motion to produce, please supply copies of all items referred to in paragraph 6(c).

8. Please identify by name and address all individuals who have provided to the United States of America, or to any of its agents, attorneys, representatives, or others acting in its behalf,

or to any state or local law enforcement personnel, any information to the effect that, or expressed the belief that, Salvatore Anthony Annunziato is presently alive and in abscondance and unwilling to appear in court.

9. With respect to each individual named in paragraph 8, please state:

a. The date, time and location of the transmission of said information;

b. The identity and affiliation of the recipient of said information;

c. Whether any sound transcription, written memorandum, report, note or any other written memorialization of the conveyance of such information was made;

d. If the answer to the preceding subparagraph is in the affirmative, please identify each transcription, memorandum, report, note or other memorialization;

e. Whether any reward, fee, moneys, remuneration, or consideration of any kind (including promises of leniency or promises to make cooperation known to law enforcement or judicial authorities) was requested, offered and/or accepted in connection with said information;

f. If the answer to subparagraph (e) is in the affirmative, please state the nature of the consideration, the manner in which it was conveyed, the date of conveyance and, in the case of promises, to whom conveyed;

g. A full and complete summary of all such information;

h. Whether the individual has ever provided other information to any state, local or federal law enforcement authorities;

i. If the answer to subparagraph (h) is in the affirmative, please state the subject matter of such information, to whom that information was transmitted, any and all consideration extended in connection with said information; the date, time, and place of the conveyance of such information;

j. The basis for that individual's information or belief.

10. Please identify by name and address all individuals interviewed by federal law enforcement authorities who have been asked about the whereabouts of Salvatore Anthony Annunziato.

11. Please list by name and address all individuals who have been subpoenaed to testify and/or have testified at any federal grand jury proceeding during the course of which inquiry was made as to the whereabouts of Salvatore Anthony Annunziato.

12. Please state whether the grand jury investigation referred to in paragraph 4(g) of the Government's motion for forfeiture of bond resulted in the return of a "true bill" or "no true bill".

13. If you will do so without a motion to produce, please supply copies of the transcripts of all proceedings before the grand jury in connection with the investigation referred to in paragraph 4(g) of the Government's motion.

14. Please describe the notice provided in connection with the July 9, 1979 calendar call referred to in paragraph 3(g) of the Government's motion and the manner in which said notice was purportedly conveyed to Salvatore Anthony Annunziato.

15. If you will do so without a motion to produce, please attach copies of all said notices referred to in the answer to paragraph 14.

16. If you will do so without a motion to produce, please attach all reports relating to the efforts of any federal law enforcement authority to ascertain the whereabouts of Salvatore Anthony Annunziato.

17. Please state whether the United States of America is presently in possession of any information to indicate that Salvatore Anthony Annunziato has ever willfully failed to appear for any court appearance when required to do so.

18. Please state whether the United States of America has

any information to indicate that Salvatore Anthony Annunziato has ever violated any of the conditions of bond on any previous occasions.

19 (a). Please describe all efforts of the United States of America to locate Salvatore Anthony Annunziato between June 19, 1979 to the present.

(b). Please describe all efforts of state and local law enforcement authorities to locate Salvatore Anthony Annunziato presently known to the United States of America.

20. Please state whether the United States of America has obtained any information about Salvatore Anthony Annunziato through the use of electronic surveillance.

21. If the answer to the preceding interrogatory is in the affirmative, please:

a. Identify the information;

b. Identify the parties to the conversation;

c. State the date and times said information was received;

d. Describe the information;

e. State whether said electronic surveillance was the result of a court order, and, if you will do so without a motion to produce, attach a copy of said court order;

f. State whether a transcription was made of that conversation and, if you will do so without a motion to produce, attach a copy of said transcription;

g. If there is a tape recording of said electronic surveillance, and if you will do so without a motion to produce, please provide a copy of said tape recording.

22. Please state whether any representative of the United States of America has ever informed counsel for Salvatore Anthony Annunziato that his life was endangered and that there was a "contract" out on him.

23. If the answer to the preceding interrogatory is in the affirmative, please state:

a. The date of such communication;

b. The identity of the individual who conveyed such information to counsel;

c. The source of the information conveyed;

d. The basis for the sources' information;

e. Whether the source received any consideration, monetary or otherwise, in connection with the provision of said information;

f. Whether the source has ever previously provided information to local, state or federal law enforcement authorities and, if so, whether he received any consideration for same;

g. Whether the United States offered the services of any law enforcement agencies to protect the life of Salvatore Anthony Annunziato.

24. Please state whether Bondsman Robert A. Jacobs has ever provided the United States, or any of its agents, attorneys, representatives, or others acting on its behalf, with any information with regards to the whereabouts of Salvatore Anthony Annunziato.

25. If the answer to the preceding interrogatory is in the affirmative, please state:

a. The date, time and location of the conveyance of said information;

b. A summary of said information.

26. Please describe all efforts now known to federal law enforcement authorities to have been made by Bondsman Robert A. Jacobs to attempt to locate and return Salvatore Anthony Annunziato.

27. Please state all information presently known to the United States of America which indicates that Mr. Annunziato is presently deceased and identify the sources of said information.

28. Please identify and summarize all information presently in the possession of the United States of America which indicates that Mr. Annunziato willfully failed to appear at court when required to do so and identify the sources of all said information.

29. Please state whether the United States of America has in its files any information to the effect that Salvatore Anthony Annunziato was connected in any way with individuals whom the United States of America considers to be members of "organized crime".

30. If the answer to the preceding interrogatory is in the affirmative, please:

a. Identify the individuals;

b. Identify the source or sources of said information by name and address;

c. Set forth the date, time and place of the receipt of such information;

d. State whether the source or sources of said information has ever received any consideration for such information and, if so, describe that consideration;

e. State whether the source or sources has/have ever previously provided information to federal law enforcement authorities;

f. Provide a full and complete summary of such information;

g. State whether any said transcription, written memorandum, report, note or other written memorialization of the conveyance of said information was made.

31. If you will do so without a motion to produce, please supply copies of all items referred to in response to paragraph 30(g).

32. Please explain why interviews were conducted by the F.B.I. in Florida, California, North Carolina, Pennsylvania and Missouri.

33. Please identify all countries, states or territories other than Connecticut and those listed in paragraph 32 where interviews were conducted by the F.B.I.

34. Please state whether at any time from April 26, 1979 to the present, the United States of America received any information indicating that Mr. Annunziato had fallen into disfavor with individuals whom the United States of America believes to be members of organized crime.

35. If the answer to paragraph 34 is in the affirmative, please describe that information and identify the source.

Respectfully submitted,

WILLIAM F. DOW, III
JACOBS, JACOBS & GRUDBERG, P.C.
350 Orange Street
New Haven, Connecticut 06503

[Certification omitted]

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	
	:	Cr. No.
v.	:	N-79-48
	:	
SALVATORE ANTHONY ANNUNZIATO	:	

REQUEST FOR PRODUCTION

It is hereby requested that the United States of America, through its Special Attorney, produce to the undersigned or permit the undersigned to inspect and to copy each of the following documents:

1. Any sound transcription, written memorandum, report, note or any other written memorialization of any information indicating that the life, health, or safety of Salvatore Anthony Annunziato was endangered, which was conveyed to the United States, or any of its agents, attorneys, representatives or others acting in its behalf, or to any state or local law enforcement personnel from April 26, 1979 to the present.

2. Any sound transcription, written memorandum, report, note or any other written memorialization of any information to the effect that, or an expression of belief that, Salvatore Anthony Annunziato is presently deceased which was conveyed to the United States of America, or to any of its agents, attorneys, representatives, or others acting in its behalf, or to any state or local law enforcement personnel from April 26, 1979 to the present.

3. Any sound transcription, written memorandum, report, note or any other written memorialization of any information to the effect that, or an expression of belief that, Salvatore Anthony Annunziato is presently alive and in abscondence and unwilling to appear in court, conveyed to the United States of America, or to any of its agents, attorneys, representatives, or

others acting in its behalf, or to any state or local law enforcement personnel, from April 26, 1979 to the present.

4. All of the transcripts of all proceedings before any federal grand jury in connection with the investigation referred to in paragraph 4(g) of the Government's motion for forfeiture of bond.

5. All notices provided in connection with the July 9, 1979 calendar call of the matter of the *United States* v. *Salvatore Anthony Annunziato.*

6. Any court order authorizing electronic surveillance, which electronic surveillance has been employed by the United States in its investigation into the disappearance of Salvatore Anthony Annunziato or, through which, the United States of America has obtained information about Salvatore Anthony Annunziato, from April 26, 1979 to the present.

7. Any sound transcription, written memorandum, report, note or other written memorialization of any information conveyed to the United States, or any of its agents, attorneys, representatives or others acting in its behalf, or to state or local law enforcement personnel, to the effect that Salvatore Anthony Annunziato was connected in any way with individuals whom the United States of America considered to be members of "organized crime".

It is requested that the aforesaid production be made on or before the 30th day following the service of this request at the office of Jacobs, Jacobs & Grudberg, P.C., 350 Orange Street, New Haven, Connecticut.

William F. Dow, III
Jacobs, Jacobs & Grudberg, P.C.
350 Orange Street
New Haven, Connecticut 06503

[certification omitted]

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	No.
v.	:	N-79-48
SALVATORE ANNUNZIATO	:	

Government's Response to Defendant's Request for Extension of Time to File Responsive Memorandum and to Service of Interrogatories and Requests for Admissions

Comes now the United States, by and through its undersigned attorneys, and responds to the request by Salvatore Annunziato for an extension of time in which to file a "responsive" memorandum to the Government's motion for forfeiture of bond.

The rationale for an extension of time is bottomed upon the tenth and final paragraphs of the defendant's motion, as follows:

> An opportunity is requested to present evidence to show that bond should not be forfeited. Counsel requires time to gather evidence to be presented at that hearing. Interrogatories and Requests for Admissions (attached hereto as Exhibits A and B respectively) have been served on the United States in order to assist in obtaining evidence to show why the bond should not be forfeited.
>
> * * *
>
> WHEREFORE, it is respectfully requested that the time within which a Memorandum in Opposition to the Motion for Forfeiture must be filed be extended until such time as discovery is completed, and that an evidentiary hearing be allowed.

As is apparent from the foregoing, the defendant's motion for an extension of time is based upon the assumption that his purported interrogatories and requests for admissions are proper and will be answered. That assumption is erroneous. The defendant apparently relies upon Rules 33 and 36 of the Federal Rules of Civil Procedure in this regard; however, as Rule 1 of

the Federal Rules of Civil Procedure states, the Rules apply only to "suits of a civil nature." The instant case is a federal criminal prosecution, and the defendant's bond was instituted pursuant to the Federal Criminal Code, 18 USC §3146, and the Federal Rules of Criminal Procedure, Rule 46. The Government's motion for forfeiture of bond was filed pursuant to Rule 46(e), Federal Rules of Criminal Procedure, and the Rules of Civil Procedure have no application to such bond forfeiture proceedings. *United States* v. *Jones,* 567 F2d 965 (10th Cir. 1977).

Accordingly, because the defendant has no right to the "discovery" he requests, his motion for an extension of time is groundless, and should be denied.

Respectfully Submitted,

RICHARD BLUMENTHAL
UNITED STATES ATTORNEY

WILLIAM A. KEEFER
Attorney
U.S. Department of Justice

COURT EXHIBIT 1

The contents of this exhibit have not been made available to Petitioners. The Government submitted the contents under seal for *in camera* inspection by the District Court. This exhibit was forwarded under seal to the United States Court of Appeals for the Second Circuit for its examination. Petitioners have requested the Clerk of the United States Court of Appeals for the Second Circuit to certify and forward, under seal, this exhibit.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	Cr. No.
v.	:	N-79-48
SALVATORE ANNUNZIATO	:	

GOVERNMENT'S MEMORANDUM IN SUPPORT OF MOTION FOR FORFEITURE AND JUDGMENT OF DEFAULT

Comes now the United States, by and through its undersigned attorneys, and in support of its motion for Forfeiture of Bond by Salvatore Annunziato and for a judgment of default, submits the following memorandum of law:

* * *

Moreover, the cost and inconvenience to the Government in its attempt to locate Salvatore Annunziato has been substantial. An FBI and grand jury investigation into the disappearance of Salvatore Annunziato was conducted between June, 1979 and January, 1980. Approximately 80 persons were interviewed by the FBI pursuant to that investigation, including persons located in Florida, California, North Carolina, Pennsylvania, Missouri, and elsewhere. It should further be noted that the Government is not required to establish the amount of its expenses incurred as a result of a breach of the conditions of bond. *United States* v. *Foster, supra; United States* v. *Accardi, supra; Cf, United States* v. *Stanley, supra; Jeffers* v. *United States, supra.*

* * *

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	
	:	Cr. No.
v.	:	N-79-48
	:	
SALVATORE ANTHONY ANNUNZIATO	:	

MOTION FOR RECONSIDERATION OF DENIAL OF REQUEST FOR IDENTITY OF INFORMANT

It is respectfully requested that this Court reconsider its order of April 14, 1980 denying defendant's request for the identity of the informer involved in this matter and any information he has supplied to law enforcement authorities regarding any contract on Mr. Annunziato's life and the execution of that contract.

In support of this Motion, defendant submits the brief attached hereto.

Respectfully submitted,

JACOBS, JACOBS & GRUDBERG, P.C.
350 Orange Street
New Haven, Connecticut 06503
Telephone: (203) 772-3100

By
Howard A. Jacobs
Attorney for Defendant

Office-Supreme Court, U.
FILED
MAY 29 1981
ALEXANDER L. STEVAS
CLERK

No. 80-1658

In the Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT A. JACOBS AND
MIDLAND INSURANCE COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

JANIS H. KOCKRITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the district court erred in denying petitioners' discovery motions in a bond forfeiture proceeding on the ground that the requested information was privileged.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1658

ROBERT A. JACOBS AND
MIDLAND INSURANCE COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-3) and the district court's orders (Pet. App. 4-8, 9) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 10, 1980. A petition for rehearing was denied on February 5, 1981. The petition for a writ of certiorari was filed on April 2, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners gave a bond of $30,000 on behalf of Salvatore Annunziato, a criminal defendant in the United States Dis-

trict Court for the District of Connecticut.[1] On July 9, 1979, Annunziato failed to appear at a hearing ordered by the court, and the court issued a bench warrant for his arrest (I Tr. 13).[2] Nine months later, following a fruitless grand jury inquiry into Annunziato's disappearance, the government moved that his bond be forfeited and that a default judgment be entered (Pet. App. 13-15). See Fed. R. Crim. P. 46(e).

1. Petitioners defended by claiming that Annunziato had been killed by organized crime figures before July 9, 1979, making it impossible for him to appear as required. Petitioners filed extensive requests for discovery (Pet. App. 16-29), seeking, among other things, information in the government's possession that would tend to establish that Annunziato's life had been threatened or that he was dead (see, *e.g.*, *id.* at 19, 25). The government opposed petitioners' discovery requests (*id.* at 30-31) but agreed to submit its files to the district court for an in camera review (II Tr. 34).

The district court, after examining the documents in question, found that "[t]he information contained in the F.B.I. files relative to the whereabouts of Mr. Annunziato, specifically the speculation that he is deceased, was obtained by the F.B.I. from informant sources developed during the course of a criminal investigation" (Pet. App. 6). Consequently, the court held, the informant's privilege described in *Roviaro* v. *United States*, 353 U.S. 53 (1957), applied to petitioners' discovery requests (Pet. App. 6). *Roviaro* required that petitioners' interest in obtaining the information be balanced against the government's interest

---

[1]Annunziato was indicted for aiding and abetting the unlawful appropriation of union funds and conspiracy unlawfully to appropriate union funds, violations of 29 U.S.C. 501(c) and 18 U.S.C. 371 (Pet. 1).

[2]"I Tr." refers to the transcript of the hearing on July 9, 1979. "II Tr." refers to the transcript of the April 1, 1980, hearing. "III Tr." refers to the transcript of the May 30, 1980, hearing.

in protecting the identities of its informants (*id.* at 7). The court recognized that *Roviaro* involved a criminal defendant's efforts to obtain information from the government, and it suggested that petitioners' stake in the case was less weighty than that of most criminal defendants (*ibid.*). Moreover, the court said, the information petitioners sought was only "equivocal" (*ibid.*) and was not likely to be of substantial help to them; the court found that there was "no information" in the government's files "which establishes that Mr. Annunziato was dead on or before July 9, 1979" and that the information that was in the files about Annunziato's possible death "can at best be characterized as speculative uncorroborated multiple hearsay which is also contradictory in nature" (*id.* at 5-6). Since the disclosure of this information would be "likely to lead to the identity of the [government's] source" (*id.* at 7), the court held that petitioners' interest did not outweigh the government's, and that petitioners were not entitled to the information they sought.

2. The court heard conflicting evidence on the merits of petitioners' impossibility defense. A former government attorney testified that in late May of 1979 he had learned from an FBI agent that a source, whom the attorney described as "unreliable," said that "there was a contract on the life of Mr. Annunziato" (III Tr. 14-15, 20). The government attorney told Annunziato's attorney of the threat and offered Annunziato federal protection, but Annunziato rejected the offer (*id.* at 14-16). Annunziato's wife testified that she last saw him on June 19, 1979, but that she was subsequently given money, on one occasion, by a person who had given her money during Annunziato's prior incarcerations (*id.* at 6-8, 11, 36-37). On June 27, 1979, she notified the local police that Annunziato was missing, and they notified the FBI (*id.* at 9-10; I Tr. 8). Another local police officer who investigated Annunziato's disappearance testified that it was his "opinion" that Annunziato "met his

demise at the hands of the underworld" (III Tr. 67). He testified that his opinion was the result of his investigations and informant information, some of which may have been based on rumor, hearsay, and gossip (*id.* at 69). Petitioners introduced a transcript of a conversation recorded in September 1979 between a police officer and an informant (*id.* at 33) in which the informant said that Annunziato was dead. The government introduced the testimony of an FBI agent who had spoken twice with the same informant after Annunziato's disappearance and before September; once the informant said he had no knowledge of Annunziato's whereabouts and speculated that he had absconded, and on the second occasion the informant said he had just learned that Annunziato might have gone to Italy (*id.* at 43-44). A manager of a local motel documented that Annunziato had stayed in a room there on June 18 and 19, 1979 (*id.* at 47-52). A maintenance worker also saw Annunziato check into the motel on June 18 carrying a large amount of cash (*id.* at 56-58).

Petitioner Jacobs, the bondsman, also testified about Annunziato's disappearance (I Tr. 4-7). He testified that he had given bond for Annunziato on other occasions (*id.* at 6). He said that he had met with Annunziato at a restaurant on June 19, 1979, and had made an appointment to meet him on June 23 (*id.* at 4-5). Annunziato did not keep the latter appointment (*id.* at 5). Petitioner Jacobs said that in an effort to locate Annunziato he had "spent considerable time speaking to people, canvassing friends of his, friends of mine, and, also, members of the police department * * *" (*id.* at 6). He testified that he had a "feeling that something ha[d] happened to" Annunziato, and that "his friends feel that way * * *. Because I know Mr. Annunziat[o] could not exist anywhere other than his environment in New Haven" (*id.* at 6-7).

The district court granted the government's forfeiture motion (Pet. App. 9). It held that "the testimony presented by the bondsman as circumstantial evidence of the defendant's death, prior to July 9, 1979, seriously lacks the competence, or sufficiency required to excuse a criminal defendant's failure to appear" (*ibid.*). The court of appeals affirmed (*id.* at 1-3), "substantially for the reasons stated" by the district court (*id.* at 3). It noted that it had "examined both the sealed information submitted by the government to the district judge and the entire record" and concluded that the district judge had acted properly both in denying petitioners' discovery requests and in granting the government's forfeiture motion (*ibid.*). The court of appeals added: "We wish to make clear if any new evidence is uncovered which indicates that Annunziato was deceased on July 9, 1979, appellants are free to move to reopen the forfeiture proceeding without prejudice from this order" (*ibid.*).

ARGUMENT

Petitioners do not contend that the district court erred in rejecting, on the basis of the record before it, petitioners' impossibility defense. The district court's decision on this point was, in any event, not clearly erroneous; the evidence that Annunziato had been killed was highly attenuated. Instead, petitioners' principal claim is that the district court improperly denied petitioners' discovery requests.[3] But the

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[3]Petitioners also argue that there is a conflict among the circuts on whether the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure apply to a motion to forfeit bond (Pet. 10). Petitioners *urged* the district court, over the government's objection (see Government's Response to Defendant's Request for Extension of Time to File Responsive Memorandum and to Service of Interrogatories and Requests for Admissions (filed March 27, 1980)), to apply the discovery provisions of the civil rules. Petitioners recognized that the civil discovery rules were more favorable to them, in certain respects at least, than the criminal rules. The district court merely "assume[d]," "[f]or purposes of this order" (Pet. App. 6), that the civil rules applied. Thus it is

district court, in holding that the informant's privilege protected the government documents from disclosure, considered the relevant factors and struck a reasonable balance between petitioners' interest in obtaining the material and the government's interest in confidentiality. The court of appeals expressly noted that it had examined the documents in question, and it ratified the district court's decision. The correctness of this determination depends on the particular facts of this case, and further review by this Court is not warranted.

The government has a "privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law." *Roviaro* v. *United States, supra,* 353 U.S. at 59. See also *Branzburg* v. *Hayes,* 408 U.S. 665, 697-698 (1972); *United States* v. *Ventresca,* 380 U.S. 102, 108 (1965).[4] As petitioners recognize (Pet. 14), a court deciding whether to order disclosure must "balanc[e] the public interest in protecting the flow of information against the individual's right to prepare his [case]" (*Roviaro* v. *United States, supra,* 353 U.S. at 62). Here the district court found that disclosing the

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not even clear that the courts below have taken a position on this issue; and if they have, it is the position for which petitioners argued and from which petitioners benefitted.

[4]Petitioners contend (Pet. 12-13, 15) that the district court invoked the informant's privilege sua sponte. In fact, however, government attorneys strenuously opposed petitioners' discovery requests on the ground that disclosing the information petitioners sought would jeopardize an "ongoing criminal investigation" (II Tr. 32, 34). Neither petitioners nor the court asked the government to elaborate on this reason for opposing disclosure. Moreover, as all parties knew, much of the information about Annunziato's disappearance was derived from informants. Thus it is reasonable to conclude that the court and all the parties understood that one of the government's concerns was that disclosing the information might reveal the identities of informants.

requested information would be likely to reveal the informants' identities (Pet. App. 7); thus the government's interest in confidentiality was substantial. By contrast, the information was of very limited usefulness to petitioners. The court found that it consisted mostly of contradictory hearsay and rumor (*id.* at 5-6) and did not establish that Annunziato was dead (*id.* at 5). Moreover, petitioners were not denied the opportunity to bring the information in the government's files to the judge's attention; the judge reviewed the files, and the government did not object to his considering their contents in reaching his decision on the merits (see II Tr. 34). At most, petitioners suffered only the slight injury of not being able to use the government's information for further argument and investigation.[5]

Finally, petitioners had substantial independent sources of information. They knew the identity of the informant whose recorded telephone conversation was introduced into evidence. More important, petitioner Jacobs himself apparently was well acquainted with Annunziato and had significant sources of information about Annunziato among

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[5]Petitioners contend that the government cannot raise the informant's privilege in a civil action in which it is the plaintiff because by bringing suit it automatically waives the privilege (Pet. 15-16). This contention is wholly without merit. The privilege was developed in connection with criminal prosecutions which are, of course, brought by the government (see, *e.g.*, *Roviaro, supra*, 353 U.S. at 59-62; *Scher* v. *United States*, 305 U.S. 251, 254 (1938)). In a criminal prosecution, the government's use of the privilege must be reconciled with specific constitutional protections, such as the defendant's right to compulsory process, that have no counterpart in this civil case. Moreover, petitioners' stake in this proceeding—the loss of money, without the potential "stigma[]" of a criminal conviction (see *In re Winship*, 397 U.S. 358, 363 (1970))—is substantially less than that of most, if not all, criminal defendants. Lower courts have consistently held that the informant's privilege applies in a civil action. See, *e.g.*, *In re United States*, 565 F. 2d 19, 22 (2d Cir. 1977); *Westinghouse Electric Corp.* v. *City of Burlington, Vermont*, 351 F. 2d 762, 769-770 (D.C. Cir. 1965).

his own and Annunziato's friends. This further diminished the value to petitioners of the evidence in the government's files, and it further undermines any claim by petitioners that the information they sought was "critical to [their] case" (*Branzburg* v. *Hayes, supra,* 408 U.S. at 698).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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